

**FALMOUTH ZONING BOARD OF APPEALS
FINDINGS AND DECISION**

APPEAL NO: 082-17

APPELLANT/OWNER: LAWRENCE-LYNCH REALTY CORP. of Falmouth, MA

SUBJECT PROPERTY: Blacksmith Shop Road, Hatchville, Massachusetts
Assessor's Map: Map 22 Section 02 Parcel 009 Lot 000

DEED/CERTIFICATE: Book 29110 / Page 043

SUMMARY: Board Upheld the Building Commissioner's Determination – Appeal Denied

PROCEDURAL HISTORY

1. Under a date of September 13, 2017, the appellant filed an appeal with the Falmouth Town Clerk pursuant to M.G.L. c. 40A §§ 8 and 15 and 240-202 of the Code of Falmouth appealing the Building Commissioners determination that the subject property may not be used as the site for a solar photovoltaic array as a matter of right on subject property known as 0 Blacksmith Shop Road, Hatchville, Massachusetts.
2. Notice was duly given as required by Section 11 of Chapter 40A, M.G.L., as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the Board's discretion, relevant and appropriate testimony was heard.
3. A duly advertised public hearing was opened on November 2, 2017. The appellant's representative, Attorney Edward W. Kirk, requested multiple continuations of the hearing and signed waivers to extend the one-hundred (100) day hearing process for this appeal (see file for signed waivers filed with the Town Clerk).
4. The public hearing was closed on June 21, 2018, wherein the Board consisting of Chairman Kenneth Foreman, Vice Chairman Terrence Hurrie, Acting Clerk Ed Van Keuren, Member Paul Murphy and Alternate Robert Dugan (sitting as voting member replacing Kimberly Bielan) made a decision to Uphold the Building Commissioner's Determination that the Appellant is not entitled to a building permit as of right. Minutes of the hearing(s) are on file in the Board of Appeals.
5. The appellant was represented at the hearing by Attorney Edward W. Kirk who reviewed and discussed the appeal of the Building Commissioner's determination relative to proposed photovoltaic solar array on subject property.
6. The Board received documents and information prior to and during the public hearing that are on file in the office of the Board of Appeals at Town Hall, as set forth below:

Letters/E-mails from Abutters/Interested Parties

09/28/2017 Email letter submitted to the file from Loretta O'Brien of 462 Blacksmith Shop Road stating opposition to Appeal and to any more special permits or re-zoning of the area from residential use.

Letters/E-mails/Information from Applicant/Representative(s)

- 09/13/2017 Attorney Edward W. Kirk submitted, on behalf of Appellant (Lawrence-Lynch Realty Corp.) an appeal filed with the Town Clerk on September 13, 2017 at 10:30 AM – attached to the Appeal are 2 Exhibits: Exhibit 1 is letter dated August 17, 2017 from Building Commissioner Palmer to Attorney Edward W. Kirk with opinion on M.G.L. C. 40A, s. 3; and Exhibit 2 is a letter from Attorney Edward W. Kirk dated August 3, 2017 to Building Commissioner Palmer regarding request under MGL c40A, sec 3 to allow use on subject property of photovoltaic solar arrays
- 05/03/2018 Letter submitted to the file from Attorney Edward W. Kirk dated May 2, 2018 to Falmouth Zoning Board of Appeals opining on M.G.L. C. 40A s. 3 (attached to letter was copy of said section of MGL)
- 06/19/2018 Letter submitted to the file from Attorney Edward W. Kirk dated June 19, 2018 in response to Town Counsel's Memo submitted to the file dated 6/14/2018 (opinion of c 40A, sec 3)

Letters/Referrals/E-mails from Town Departments

- 09/14/2017 ZBA staff submitted to the file a copy of Chapter 40A, Section 3 of MGL
- 09/20/2017 ZBA staff submitted to the file a copy of previous Use Variance and modifications of said Variance: #2543, #30-86 and #53-86
- 09/27/2017 Referral submitted to the file from Planning Department staff that states: *Applicant before PB on 9/26/2017 for proposed Town Meeting Article to change Zoning from AGA to LIC*
- 06/14/2018 Memo submitted to the file from Town Counsel Duffy dated 6/14/18 in response to Board's request for opinion on M.G.L. Chapter 40A, Section 3

Note: ZBA sent Referral requests to: Building Department, Planning Department, Board of Selectmen and Town Counsel

Plans submitted by Applicant/Applicant's Representative

“Plan of Land” prepared for Lawrence-Lynch Corp. in Hatchville, MA as drawn by Holmes and McGrath, Inc. – Sheet 1 of 1 dated March 5, 1997 – plan is stamped and signed by Mary Ellen Streeter, PE with a Board date ‘received’ stamp of September 13, 2017; and

An aerial photo submitted showing a preliminary system site plan by Borrego Solar Systems for a photovoltaic solar array and subject property – with a Board date ‘received’ stamp of September 13, 2017.

Hearing – May 3, 2018:

Attorney Edward Kirk, representing Lawrence Lynch, explained the background of the time frame from submitted appeal and requests for continuation to a date after Town Meeting. The Appeal of the determination by the Building Commissioner, submitted to the Town Clerk and ZBA on September 13, 2017, was originally scheduled for November 2, 2017. The applicant then submitted requests to continue the opening of the hearing until after November 2017 Annual Town Meeting due to Article 7 being presented to Town. The applicant learned of Article 7 on the November 2017 Annual Town Meeting requesting Town to vote to allow subject property to be rezoned from Agricultural A to Light Industrial C2 (it is noted as C2 in the Town Warrant Book) which would

allow for photovoltaic solar array on said property. The Article was voted down at Town Meeting. Applicant became aware of Article 9 being presented at the April 2018 Town Meeting wherein the Town would vote to allow photovoltaic solar arrays in Agricultural A and Agricultural AA districts. The Planning Board had recommended 'Indefinite Postponement' which was passed in a blanket vote by Town Meeting.

Attorney Kirk then reviewed the 65 acre subject parcel that is zoned Agricultural A, which has been used in the past as a sand and gravel pit. He explained that a company has contacted the property owner to install a solar farm on a portion of the subject property. He noted that the property is ideal as it has maximum exposure of the sun and that only 35 acres of the property would be used for the proposed solar photovoltaic arrays. Attorney Kirk reviewed the Town bylaw that allows ground mounted solar arrays in Light Industrial C zoning only. He stated that the legislature has said that towns may not prohibit this use as well as other uses such as educational, religious and agricultural. He said that the Town allowed solar array in Light Industrial C but prohibited elsewhere in the Town. Attorney Kirk reviewed the two (2) Town meetings (Annual in November 2017 – to change subject property to Light Industrial C and then in the Annual in April of 2018 to allow solar photovoltaic arrays in Agricultural zoning) and with no change in the zoning district or zoning. Attorney Kirk stated it is his position that the statute is clear (MGL C. 40A, s. 3) and that you cannot unreasonably regulate solar use and that you cannot prohibit this use anywhere in the Town.

The Board discussed the appeal with Attorney Kirk.

Member Murphy asked Attorney Kirk if he was aware that towns in the Commonwealth that allow large ground mounted solar farms are allowed in specific zoning districts. Attorney Kirk said he is concerned with Falmouth.

Member Hurrie asked Attorney Kirk how different this is from any other zoning restriction or restrictions that require a special permit. Attorney Kirk responded that legislature said that this use cannot be prohibited. Member Hurrie asked if Attorney Kirk had any case law on this issue. Attorney Kirk responded that there is case law on religious and educational uses but has not seen any on this issue.

Chairman Foreman suggested that the Town of Falmouth has not prohibited the solar array use, but that it has specific zoning for it as a principal use.

The Board discussed the intent of the Town bylaw in 2011 creating Light Industrial C zoning for uses including solar arrays.

Zoning Administrator Budrow commented on M.G.L. C. 40A, s. 3 noting that states specifically for solar array that you cannot *unreasonably regulate and prohibit* solar array. The Town has reasonably allowed solar array as a principal use in Light Industrial C and all other zoning districts as an accessory and incidental use to a primary use. The Attorney General approved the bylaw post Town vote.

Patricia Harris, Assistant Town Counsel, pointed out that reference to educational uses in M.G.L. C 40A, s. 3 is not applicable to this case as you cannot prohibit educational uses by a nonprofit organization. She noted that each paragraph in M.G.L. C 40A, s. 3 is a standalone paragraph and suggested the Board wait for Town Counsel's opinion on this.

Chairman Foreman asked for any public comment in support or opposition of the proposed project.

David Moriarty of Deer Pond Road stated that there are major wildlife corridors in this area and he is concerned about wells in this area as well. How are you going to keep the vegetation and keep noise from the arrays down? He suggested that this use should be in industrial areas.

Attorney Kirk stated that there would be no discharge into the water or ground that would interfere with the wells.

Board discussed and will await written opinion from Town Counsel and intent of the bylaw creating Light Industrial C zoning where solar photovoltaic arrays are allowed by right.

Member Murphy stated he has experience with this use and that the Building Commissioner was correct when we reasonably regulated solar by allowing it in certain areas as a principal use and that the Building Commissioner understood M.G.L. C. 40A, s. 3 as the Town has reasonably regulated this use.

Member Dugan made a motion to continue the hearing to June 21, 2018 at 6:30 PM. Member Van Keuren seconded the motion. Motion carried 4 – 1 with Member Murphy in opposition.

Continuation of Hearing – June 21, 2018:

Attorney Kirk reviewed the opinion submitted to the file from Town Counsel Duffy who states that C. 40A, s. 3 allows restrictive zoning “where necessary to protect the public health, safety or welfare.” and then reviewed his response to Attorney Duffy’s opinion that was also submitted to the file. Attorney Kirk said he disagrees with Attorney Duffy’s opinion in that he (Attorney Kirk) believes that M.G.L. C. 40A, s. 3 allows exemptions and he believes solar array are exempt and is a by-right use in Agricultural zoning (see file for both opinions).

Attorney Kirk noted that a recent newspaper article about the Town putting a moratorium on solar arrays. He further submitted a photo of Kenyon’s Market on Route 28 that shows parking canopies that are solar arrays throughout the parking lot and asked how the Building Commissioner approved this type of array in a Business zone and not the solar array on Agricultural land.

Chairman Foreman suggested that that is not before this Board but believes it to be an accessory use to the existing primary use and not a primary use as proposed in this appeal.

Board briefly discussed opinions submitted to the file from Attorney Kirk and Attorney Frank Duffy.

Member Van Keuren made a motion to close the hearing. Member Murphy seconded the motion. Motion carried 5 - 0.

Chairman Foreman closed the hearing.

FINDINGS

The Board of Appeals, after carefully considering all of the facts and evidence submitted at the hearing, makes the following findings:

The Appeal was filed on September 13, 2017 with the Town Clerk by Attorney Edward W. Kirk on behalf of Lawrence Lynch Realty Corporation regarding determination by Building Commissioner that the proposed use of solar photovoltaic arrays on subject property located at 0 Blacksmith Shop Road in Hatchville may not be used as the site of a solar photovoltaic array as a matter of right. Lawrence Lynch Realty Corporation wants to lease its land that was previously a sand and gravel pit to a company who installs and manages solar farms. The solar farm would be the principal use of the subject property. The subject property is zoned Agricultural A.

Facts/Findings by the Board:

Exhibit 2 submitted to the file by Attorney Kirk (as part of the appeal process) is a letter from him dated August 3, 2017 to Rod Palmer the Building Commissioner explaining that Appellant [Lawrence Lynch Realty Corp.] is proposing to lease a 25 acre portion (later in hearing he stated 35 acres) to Borrego Solar Systems, Inc. for the

purpose of installing a solar photovoltaic arrays for collection, distribution and sale of solar energy. He [Kirk] went on to explain that the Town's bylaw allows solar photovoltaic arrays as a matter of right only in districts that are zoned as Light Industrial C, which he believes to be a violation of M.G.L. C. 40A, s. 3 as this section states "No zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare." He further stated that (See letter submitted as Exhibit 2 to the file.)

Exhibit 1 submitted to the file by Attorney Kirk is a letter from Rod Palmer the Building Commissioner dated August 17, 2017 to Attorney Kirk in response to Kirk's letter of August 3, 2017 wherein Palmer states that Falmouth does not prohibit solar energy systems and they are permitted as an accessory use in all zoning districts. He [Palmer] noted that the second half of s.1A refers to structures that facilitate the collection of solar energy. He further stated that Falmouth does not prohibit or unreasonably regulate these structures as they are permitted by right as a principal use in Light Industrial C zoning districts. (See letter submitted as Exhibit 1 to the file.)

The Board requested opinion on M.G.L. C. 40A, s. 3 from Town Counsel Frank Duffy relevant to solar energy systems. On June 14, 2018 the Board received an opinion from Town Counsel wherein he reviews s. 3 relevant to solar energy systems and opines that a solar energy system is defined in s. 1A as a "device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage and distribution of solar energy for space heating or cooling, electricity generating, or water heating." He stated that this definition addresses roof mounted solar panels that serves the needs of a structure that they are attached to. He further stated that Falmouth does not prohibit solar energy systems as they are permitted as an accessory use in all zoning and that the statute allows restrictive zoning "where necessary to protect the public health, safety or welfare." He believes that Falmouth does not prohibit or unreasonably regulate the structure and that they are permitted by right as a principal use in Light Industrial C zoning districts where industrial sized arrays may function safely without disturbing nearby residential properties.

[Note – summation of Town Counsel's opinion is: *It is important to note that the religious use and educational exemption is available only to governments and educational nonprofit corporations. It is not available to private enterprises. The Legislature has similarly limited the solar energy systems exemption by allowing exclusion from zoning districts where necessary to protect the public health, safety and welfare. It is not an absolute exemption. The language of the solar energy systems exemption in s. 3 controls prohibition or unreasonable regulations. Falmouth does neither and complies with s. 3.*]

The Board discussed the information, opinions submitted to the file from Attorney Kirk and Attorney Duffy, and testimony by Appellant's representative [Attorney Kirk].

The Board finds that the Town has not 'unreasonably regulated' the installation of solar energy systems and that the Town has appropriately dedicated zoning for the installation of industrial solar photovoltaic arrays and does allow solar energy as an accessory use in all zoning. The Board further finds that the subject property is zoned Agricultural A and is not allowed, according to Town zoning, a by right use of the proposed solar photovoltaic array system. Furthermore, Article XIII "Light Industrial C Districts" – Section 240-64.3 "Permitted business, commercial and industrial uses.", approved by the Town at the Annual Fall Town Meeting of November 7, 2011 – was approved by the Attorney General.

Member Van Keuren made a motion to deny the appeal and uphold the Building Commissioner's determination that the Appellant is not entitled to a building permit as of right to build a solar photovoltaic array on a 25 acre portion of the 65 acre parcel known as 0 Blacksmith Shop Road in Hatchville, Massachusetts. Member Murphy seconded the motion. Motion carried 5 – 0.

Appeal Number: 082-17
Appellant: Lawrence-Lynch Realty Corp. of Falmouth, MA
Subject Property: 0 Blacksmith Shop Road, Hatchville, MA
Map 22 Section 02 Parcel 009 Lot 000

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: 5 – 0 to Uphold the Determination of the Building Commissioner Denying the Appeal as stated above.



Terrence J. Hurrie, Vice Chairman, Board of Appeals

RECEIVED

JUN 29 2018

FALMOUTH TOWN CLERK

ROC 8:20 am

Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Falmouth Town Clerk.